



RULE-MAKING ORDER

CR-103 (June 2004)
(Implements RCW 34.05.360)

Agency: Employment Security Department

☒ **Permanent Rule**
☐ **Emergency Rule**

Effective date of rule:

Permanent Rules

- ☐ 31 days after filing.
☒ Other (specify) January 1, 2008 (If less than 31 days after filing, a specific finding under RCW 34.05.380(3) is required and should be stated below)

Effective date of rule:

Emergency Rules

- ☐ Immediately upon filing.
☐ Later (specify) _____

Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?

☐ Yes ☒ No If Yes, explain:

Purpose: The rules will implement 2007 legislation that imposes increasing disqualification periods and monetary penalties for individuals who commit fraud more than once. In addition, the rules clarify how the penalties will be calculated, notice provided to the claimant and interested employer, and repayment requirements. The rules also clarify that overpayments resulting from an employer's failure to correctly report wages and hours will not be charged to the claimant.

Citation of existing rules affected by this order:

Repealed: WAC 192-28-122, 192-28-125, 192-28-130, 192-28-135, 192-28-145, 192-28-150

Amended:

Suspended:

Statutory authority for adoption: RCW 50.12.010, RCW 50.12.040, and RCW 50.20.010

Other authority :

PERMANENT RULE ONLY (Including Expedited Rule Making)

Adopted under notice filed as WSR 07-20-120 on October 3, 2007 (date).

Describe any changes other than editing from proposed to adopted version: None.

If a preliminary cost-benefit analysis was prepared under RCW 34.05.328, a final cost-benefit analysis is available by contacting:

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EMERGENCY RULE ONLY

Under RCW 34.05.350 the agency for good cause finds:

- ☐ That immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.
☐ That state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule.

Reasons for this finding:

Date adopted: November 20, 2007

NAME (TYPE OR PRINT)

Paul Trause

SIGNATURE

TITLE

Deputy Commissioner

CODE REVISER USE ONLY

1133
07-23-128

(COMPLETE REVERSE SIDE)

**Note: If any category is left blank, it will be calculated as zero.
No descriptive text.**

**Count by whole WAC sections only, from the WAC number through the history note.
A section may be counted in more than one category.**

The number of sections adopted in order to comply with:

Federal statute:	New	_____	Amended	_____	Repealed	_____
Federal rules or standards:	New	_____	Amended	_____	Repealed	_____
Recently enacted state statutes:	New	<u>6</u>	Amended	_____	Repealed	_____

The number of sections adopted at the request of a nongovernmental entity:

New	_____	Amended	_____	Repealed	_____
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The number of sections adopted in the agency's own initiative:

New	<u>7</u>	Amended	_____	Repealed	_____
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The number of sections adopted in order to clarify, streamline, or reform agency procedures:

New	<u>7</u>	Amended	_____	Repealed	<u>6</u>
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The number of sections adopted using:

Negotiated rule making:	New	_____	Amended	_____	Repealed	_____
Pilot rule making:	New	_____	Amended	_____	Repealed	_____
Other alternative rule making:	New	<u>13</u>	Amended	_____	Repealed	<u>6</u>

NEW SECTION

WAC 192-100-050 Fraud defined. (1) For purposes of RCW 50.20.070, RCW 50.20.190, and Chapter 192-220 WAC, fraud means an action by an individual where all of the following elements are present:

- (a) The individual has made a statement or provided information.
 - (b) The statement was false.
 - (c) The individual either knew the statement was false or did not know whether it was true or false when making it.
 - (d) The statement concerned a fact that was material to the individual's rights and benefits under Title 50 RCW.
 - (e) The individual made the statement with the intent that the department would rely on it when taking action.
- (2) To decide whether an individual has committed fraud, the elements in subsection (1) must be shown by clear, cogent, and convincing evidence. Fraud cannot be presumed. Circumstantial evidence, rather than direct evidence, is enough to establish fraud if the evidence is clear, cogent, and convincing.
- (3) This definition of fraud also applies to the term "misrepresentation" in RCW 50.20.190. A violation of RCW 50.20.070 must meet this definition of fraud.

Chapter 192-220 WAC OVERPAYMENT NOTICE, ~~((AND-))~~ASSESSMENT AND FRAUD

NEW SECTION

WAC 192-220-015 What is an overpayment assessment? As used in this chapter and Chapter 192-230 WAC, the term "overpayment assessment" includes both unemployment benefits you received for which you were not eligible as well as any penalty assessed under RCW 50.20.070 resulting from fraud.

NEW SECTION

WAC 192-220-040 How will the disqualification period and penalty established by RCW 50.20.070 be assessed? (1) RCW 50.20.070 provides for increasing disqualification periods and dollar penalties when a second, third or subsequent fraud is committed. The department will decide whether an action is the first, second, third or subsequent occurrence based on the factors in this section.

(2) Once the department mails a fraud decision, any fraud that is found for weeks filed before, or within 14 days after, the mailing date of the decision will be treated as part of the same occurrence of fraud. This applies even if the decisions involve different eligibility issues.

Example: A fraud decision is mailed on June 1 for weeks claimed on April 30. On July 1, a decision is mailed assessing fraud for weeks claimed on March 31. Both decisions will be treated as the same level occurrence because the weeks covered by the July 1 decision were filed before the June 1 decision was mailed.

(3) The department will treat any fraud for weeks filed more than 14 days after the mailing date of a prior fraud decision as a separate occurrence of fraud. This applies even if the weeks claimed occur before the weeks for which fraud was assessed in the prior decision.

Example: On June 1, a decision is mailed assessing fraud for weeks you claimed on March 31. On July 10, late claims are filed for weeks before March 31 in which fraud is committed. The later decision is treated as a subsequent occurrence of fraud because the late claims were filed more than 14 days after June 1.

(4) The department will assess a disqualification period and penalty for each fraud decision issued based on whether it is a first, second, third or subsequent occurrence.

Example 1: A first occurrence of fraud is assessed on June 1 with a disqualification period of 26 weeks beginning with the week of June 1. Another fraud decision is issued on June 12 that is found to be part of the first occurrence. The disqualification period is 26 weeks beginning with the week of June 1st.

Example 2: A first occurrence of fraud is assessed on June 1 with a disqualification period of 26 weeks beginning with the week of June 1. A second occurrence of fraud is assessed on July 10 with a disqualification period of 52 weeks beginning with the week of July 10 and a penalty of 25 percent for the weeks fraudulently paid.

(5) All disqualifications and penalties in this section are in addition to the required repayment of any benefits paid as a result of fraud.

NEW SECTION

WAC 192-220-045 How is the fraud penalty calculated?—RCW 50.20.070. (1) The department will assess the penalty established under RCW 50.20.070 for second, third, or subsequent occurrences of fraud based on a percentage of benefits paid for those weeks in which the fraud occurred or that were paid as a result of fraud. The penalty will not apply to other weeks that may be included in the same eligibility decision.

(a) For a second occurrence, the penalty is 25 percent of benefits overpaid.

(b) For a third or subsequent occurrence, the penalty is 50 percent of benefits overpaid.

(2) The penalty amount, if not a multiple of one dollar, is rounded up to the next higher dollar.

NEW SECTION

WAC 192-220-050 Will I receive a decision if a fraud penalty changes following a redetermination or appeal of another fraud decision?

(1) The department will issue a new decision showing the corrected disqualification period and penalty if a disqualification period or penalty changes because of a change to another fraud decision following a redetermination or appeal.

Example 1: A first occurrence of fraud is assessed on June 1 and a second occurrence is assessed on July 10. The June 1 fraud assessment is overturned through appeal, making the July 10 decision the first occurrence. The department will issue a correction to the July 10 decision showing the penalty for a first occurrence of fraud (26 week disqualification and no dollar penalty).

Example 2: A decision assessing a first occurrence of fraud is mailed on August 1 and benefits are denied for the following 26 weeks. On August 10, another fraud decision is mailed which is considered part of the first occurrence and denies benefits for the 26 weeks beginning August 1. The fraud included in the August 1 decision is overturned through appeal. The August 10 decision remains and the department will issue a correction showing the 26 week denial period begins with the August 10 mailing date.

(2) Although the revised decision does not restart the appeal period included in the original decision, you may appeal a change in the penalty or period of disqualification.

NEW SECTION

WAC 192-220-060 Will I be notified of my right to appeal the overpayment? (1) The department will notify you and all interested employers in writing about the overpayment assessment and the right to appeal any of the following elements of the assessment:

- (a) The reason for the overpayment.
- (b) The amount of the overpayment.
- (c) The finding of fault or nonfault.
- (d) The reason waiver of the overpayment was allowed or denied.

(2) As used in this chapter, an interested employer is:

(a) An employer that provides information to the department which results in an overpayment assessment.

(b) Any base year employer who reimburses the trust fund for benefits paid instead of paying unemployment taxes to the extent waiver is allowed.

NEW SECTION

WAC 192-220-070 Overpayments under RCW 50.12.070(2)(c). You are not required to repay benefits improperly paid to you because an employer failed to correctly report your wages or hours and a later correction results in a lower benefit amount or your claim becomes invalid. However, you remain liable for any overpayment assessment resulting from an eligibility decision issued before your claim became invalid that has become final.

NEW SECTION

WAC 192-230-010 Repayment terms defined. For purposes of this chapter, the following definitions apply:

(1) **Outstanding balance** means the total of all unpaid overpayment assessments (including penalties), court costs, interest charges, and surcharges.

(2) **Due date** means the date by which the minimum monthly payment must be received by the department as shown on the monthly billing statement mailed to your last known address.

(3) **Delinquent** means your minimum monthly payment is not received by the department on or before the due date.

NEW SECTION

WAC 192-230-020 How are cash payments and offsets applied to my overpayment?

(1) If the department has assessed more than one overpayment against you, we will first apply payments against any overpayment involving fraud. If there are multiple overpayments involving fraud, we will apply payments in order beginning with the oldest benefit year. If none of the overpayments involve fraud, we will apply payments in order beginning with the oldest benefit year.

(2) Within the priority established in subsection (1), the department will apply cash payments to the outstanding balance in the following order:

- (a) Court costs.
- (b) Interest.
- (c) Penalties based on fraud.
- (d) Overpaid benefits.
- (e) Surcharge assessed under RCW 41.14.027.

(3) The department will only apply offsets to the overpaid benefits. Court costs, fraud penalties, interest, and surcharges cannot be offset; they must be repaid.

NEW SECTION

WAC 192-230-030 How is the minimum payment calculated? The department will calculate your minimum monthly payment as described in this section, unless we approve another payment amount.

(1) If the overpayment was assessed by another state, the department will not calculate a minimum monthly payment. If the overpayment is being recovered by offset against future benefits, recovery will be done as described in WAC 192-230-100(4).

(2) For overpayments due to fraud, your minimum monthly payment will be the greater of (a) your weekly benefit amount or (b) three percent of your outstanding balance when the billing statement is mailed, rounded down to the next whole dollar amount.

(3) For all other overpayments, your minimum monthly payment will be the greater of (a) one-third of your weekly benefit amount, (b) three percent of your outstanding balance when the billing statement is mailed, rounded down to the next whole dollar amount, or (c) twenty-five dollars.

NEW SECTION

WAC 192-230-040 When are interest charges added to my overpayment? (1) Interest will not be charged on an overpayment assessed by another state.

(2) Interest will be charged at the rate of one percent per month for overpayments based on fraud. The interest will be charged on both the overpaid benefits and the fraud penalty, if any. If you appeal the finding of fraud, interest will accrue while the appeal is pending and will be added to your overpayment if the finding of fraud is upheld.

(3) If the overpayment is not based on fraud, interest will be charged at the rate of one percent per month when any portion of two or more minimum monthly payments is delinquent.

(4) If the overpayment includes both fraud and non-fraud weeks, interest will be charged proportionally as described in subsections (2) and (3).

(5) In unusual circumstances, and at his or her discretion, the commissioner may suspend the assessment or collection of interest charges for overpayments not based on fraud.

(6) When calculating the interest charges, a month begins on the day following the last Saturday of one month and ends on the last Saturday of the next month.

NEW SECTION

WAC 192-230-090 May I repay an overpayment by offset against my benefits? (1) You may ask to repay an overpayment by offset on a valid benefit year as described in WAC 192-230-100. However, if the new balance available on your current benefit year is equal to or less than the balance of an overpayment on that benefit year, offset will be done at the rate of one hundred percent.

(2) You may ask to repay overpayments owing on prior benefit years by offset as described in WAC 192-230-100.

(3) During any valid benefit year, the total amount of benefits paid to you plus offset credits granted will not exceed the maximum benefits payable on the claim.

(4) If offset of an overpayment is granted against weeks that are later found to have been paid in error or as a result of fraud, the offset for the week(s) will be canceled and the amount will be restored to your overpayment balance.

(5) If any portion of this section conflicts with federal law or regulations, the federal law or regulations will apply.

NEW SECTION

WAC 192-320-080 Overpayments caused by incorrect reporting of wages and hours—RCW 50.12.070(2)(c) and RCW 50.29.021(3)(a). (1) When an employer incorrectly reports an individual's wages or hours, and the claim becomes invalid due to a later correction in wages or hours, the department will charge that employer one hundred percent of benefits paid to that individual, except as provided in subsection (2).

(2) This section does not apply to the entities listed below. The department will charge only for the percentage of benefits that represent their percentage of base period wages. These include wages earned:

- (a) In another state;
- (b) From a local government employer;
- (c) From the federal government; or
- (d) From any branch of the United States military.

REPEALER

The following sections of the Washington Administrative Code are hereby repealed:

WAC 192-28-122	Applications of offsets or cash repayments.
WAC 192-28-125	Recovery of benefit overpayment—Notification of right to appeal.
WAC 192-28-130	Minimum payment calculation.
WAC 192-28-135	Recovery of benefit overpayment—Overpayment collection and maximum benefit payable.
WAC 192-28-145	Overpayment subject to interest charges.
WAC 192-28-150	Benefit overpayment interest charges—Definitions.